IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 21ST MARCH 2007 / 30TH PHALGUNA 1928

SA.No. 434 of 1993()

AS.12/1991 of SUB COURT, SULTHAN BATHERY
OS.265/1983 of MUNSIFF COURT, KALPETTA

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APPELLANT/APPELLANT/PLAINTIFF

PODDAR PLANTATIONS BY DULY CONSTITUTED
ATTORNEY M.M.THAMIAH S.O. MUNDAPPA
RESIDING AT KOTTAPADY VILLAGE, VYTHIRI TALUK.

BY ADV. SMT.T.D.RAJALAKSHMI
SRI.E.R.VENKITESWARAN

RESPONDENTS:

SUBRAMANIAN, S/O. SASKILI
BHAJANAMADAM HOUSE,
MUPPAINAD VILLAGE, VYTHIRI TALUK.

BY ADV. SRI.M.RAMESH CHANDER
SRI.M.S.MANIKANDAN
SRI.V.RAMKUMAR

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 21/3/2007 THE COURT ON 21/03/2007 DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

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S.A.No. 434 OF 1993

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DATED THIS THE 21st DAY OF MARCH, 2007

JUDGMENT

Plaintiff in O.S.265 of 1983 on the file of Munsiff Court, Kalpetta is the appellant. Defendant therein is the respondent. Appellant filed the suit seeking a decree for recovery of plaint B schedule property with mesne profits. The case of appellant was that plaint A schedule property originally belonged to English and Scotish Joint Co-operative Wholesale Society Ltd which was subsequently incorporated to Co-operative Wholesale Society Ltd and under Ext.A1 sale deed dated 11.1.1973, it was assigned to the appellant and therefore appellant has title to the plaint A schedule property. It was contended that plaint B schedule property forms part of plaint A schedule property and respondent reduced the same into his unlawful possession on 10.9.1980 and therefore appellant is entitled to recover possession of the property on the strength of title with mesne profits @ Rs.50/- per annum. Respondent filed a written statement contending that plaint B schedule property does not form part of plaint A schedule property and plaint B schedule property was obtained as per an oral lease from English and Scotish Company on an annual rent of Rs.3/-

and since then respondent has been in possession of the property as a tenant entitled to the benefit of Kerala Land Reforms Act and question of tenancy is to be referred to the Land Tribunal and appellant is not entitled to the decree sought for.

2. As the question of tenancy arises for consideration, learned Munsiff referred the suit to Land Tribunal, Kalpetta under Section 125(3) of Kerala Land Reforms Act. Land Tribunal entered a finding holding that respondent is a tenant entitled to the benefit of Kerala Land Reforms Act. After receipt of the findings of the Land Tribunal, PW1 and DW1 were examined and Exts.A1 and A2 and C1 to C3 were marked.

3. Learned Munsiff, on the evidence found that the appellant did not establish that plaint B schedule property forms part of plaint A schedule property and the finding of the Land Tribunal establish that respondent is a tenant and therefore appellant is not entitled to the decree sought for. The suit was dismissed. Appellant challenged the decree and judgment before Sub Court, Sultan Bathery in A.S.12 of 1991. The learned Sub Judge, on appreciation of evidence, set aside the finding of the Land Tribunal holding that the oral lease set up by respondent was not established and there is no evidence

for payment of rent and hence respondent is not entitled to the protection of Kerala Land Reforms Act. But first appellate court upheld the finding of learned Munsiff that plaint B schedule property is not proved to be part of plaint A schedule property and therefore held that appellant is not entitled to the decree sought for. The Second appeal was filed challenging the decree and judgment in the first appeal.

4. Second a**ppeal was admitted formulating the following substantial question of law.**

5. Whether on the facts and circumstances of the case, courts below were correct in holding that plaint B schedule property does not form part of plaint A schedule property and hence appellant has no title to the plaint B schedule property.

6. Learned counsel appearing for the appellant and respondent were heard.

7. It is admitted case that plaint A and B schedule properties originally belonged to English and Scotish Joint Co-operative Wholesale Society Ltd, which was subsequently incorporated to Co-operative Wholesale Society Ltd. The case of respondent was that the plaint B schedule property was obtained as per an oral lease from English and Scotish Joint Co-operative Wholesale Society Ltd. Case of appellant was that

plaint B schedule property forms part of plaint A schedule property and under Ext.A1 it was assigned in favour of the appellant. Though the question of tenancy was referred to the Land Tribunal and the Land Tribunal upheld the claim for tenancy, first appellate court, on the evidence, found that respondent is not a cultivating tenant entitled to the benefit of Kerala Land Reforms Act. That finding was rendered on the basis that no evidence was adduced to prove the oral lease from the English and Scotish company. No evidence was also adduced to prove that any rent as alleged was paid. On the evidence the finding of the learned Sub Judge that respondent did not establish the oral lease or that he has been in possession of the property as a cultivating tenant and so not entitled to the protection under Kerala Land Reforms Act is perfectly correct and warrants no interference.

8. The title of appellant over plaint A schedule property under Ext.A1 title deed was not disputed before the trial court or first appellate court. The only contention raised was that plaint B schedule property does not form part of plaint A schedule property. Plaint B schedule property, as originally stood was 35 cents. So also, plaint A and B schedule properties are shown comprised in R.S.Nos. 760/1A, 760/1B, 760/1C and

760/2. As respondent raised a specific contention in the written statement that plaint B schedule property does not form part of plaint A schedule property and plaint A schedule property is not identifiable, appellant filed I.A.1649/1984, an application under Order XXVI Rule 9 of Code of Civil Procedure to appoint a Commission to identify the property with the assistance of a Surveyor. The application was opposed by respondent contending that as he is a tenant, the question of tenancy is to be referred to the Land Tribunal and Commissioner cannot be appointed. Learned Munsiff, as per an elaborate order, allowed the application and appointed Advocate N. Khalidraja as Commissioner. Commissioner inspected the property on 4.12.1985 along with Taluk Surveyor and submitted Ext.C1 report and Ext.C2 plan along with Ext.C3 resurvey plan of B schedule property prepared by the Taluk Surveyor. As is seen from Ext.C1 report, the Commissioner did not identify plaint A schedule property at all. He, along with Surveyor, only measured the plaint B schedule property and found that the total extent is not 35 cents as shown in the plaint and instead it is only 17 cents. Commissioner also found that R.S.Numbers shown in the plaint are not correct and plaint B schedule property actually form part of R.S.1054/2B of

Mupainad Village of Vythiri Taluk. It is thereafter appellant filed application under Order VI Rule 17 of Code of Civil Procedure and got the plaint amended by reducing the extent of B schedule property to 17 cents and also challenged the resurvey number of plaint A and B schedule properties in accordance with Ext.C1 report. Unfortunately, appellant did not file an objection. The trial court did not take note of the fact that Commissioner has not complied with the direction in the order dated 24.8.1985 whereunder Commissioner was directed to identify plaint A schedule property and find out whether plaint B schedule property forms part of plaint A schedule property. There is no evidence to prove that plaint B schedule property forms part of A schedule property. It is for that reason, courts below held that plaint B schedule property is not proved to be part of plaint A schedule property and appellant did not establish his title to the plaint B schedule property and dismissed the claim for recovery of possession on that ground. The crucial question is whether an opportunity is to be granted to the appellant to establish that plaint B schedule property forms part of plaint A schedule property.

9. It is seen from the judgment of the First Appellate Court that this aspect was taken note of by the learned Sub

Judge. But the suit was not remanded stating that appellant did not seek a remand. Unfortunately first appellate court failed to note that the suit itself was instituted for recovery of possession on the strength of title and on the contention that plaint B schedule property forms part of plaint A schedule property. first appellate court also failed to note that Commission application itself was filed to identify plaint A schedule property and report whether plaint B schedule property forms part of plaint A schedule property. When appellants sought such an identification and when learned Munsiff directed the Commissioner to report whether plaint B schedule property forms part of plaint A schedule property and Ext.C1 report establish that Commissioner did not comply with this direction at all, at least first appellate Court should have directed a proper identification of the property before deciding the question whether appellant has title to the plaint B schedule property as it forms part of A schedule property. As this aspect was not considered, interest of justice warrants that before deciding the question whether appellant is to be non-suited on the ground that he has no title to plaint B schedule property, question whether plaint B schedule property forms part of plaint A schedule property is to be decided. Even

though Commissioner was appointed for that specific purpose, the Commissioner did not identify plaint A schedule property or furnish sufficient data to decide whether plaint B schedule property forms part of plaint A schedule property. In such circumstances, the finding of courts below on the question of title and that too for the reason that plaint B schedule property is not proved to be part of plaint A schedule property is not sustainable.

10. The appeal is allowed. The decree and judgment passed by learned Munsiff as confirmed by learned Sub Judge are set aside. O.S.265/1983 is remanded to Munsiff Court, Kalpetta for fresh disposal in accordance with law. Appellant is to take out a commission to identify plaint A schedule property as well as plaint B schedule property and report whether plaint B schedule property forms part of plaint A schedule property. If plaint B schedule property does not form part of plaint A schedule property, the suit is necessarily to fail. On the other hand, if plaint B schedule property forms part of plaint A schedule property, court has to decide whether appellant is entitled to recover possession of the property on the strength of title and whether title of the plaintiff has been barred by adverse possession as claimed by the respondent. If the

Commissioner, who submitted Ext.C1 report is available, learned Munsiff may appoint the same Commissioner and if not, appoint any other experienced Commissioner may be appointed. Appellant has to meet expenses of the Commissioner. Parties are entitled to adduce evidence including on the claim for mesne profits. Parties are directed to appear before the learned Munsiff on 24.5.2007.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-